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No. 349.
Brief of Parker for D. C.

Filed Nov. 19, 1900.

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In Supreme Court of United States.

October Term, 1900.

Missouri, Kansas and Texas Railway Company of Texas

vs.

Mollie F. Ferris, et al.

Brief and Argument on Motion to Dismiss Writ of Error.

J. W. PARKER,
Counsel for Defendants in Error.

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Mollie F. Ferris for her own use, and the use of Mrs. Mattie Lee, and Sam Ferris, Frank Ferris, Myrick Ferris, Caldna Ferris, Henry Ferris, Dovie Emeline Ferris, and Lovie Eveline Ferris, minors, without any lawful guardian of their persons or estates, by their next friend, Mrs. Mollie F. Ferris, sued the Missouri, Kansas and Texas Railway Company of Texas in the district court of Bastrop county for damages for the death of James Ferris, husband of the plaintiff Mrs. Mollie F. Ferris, and father of the other plaintiffs. (Rec. 1.)

The cause was tried at the June Term, A. D. 1899, resulting in a verdict and judgment in favor of plaintiffs against defendant. (Rec. .)

The proof showed that the plaintiffs suing by next friend were aged as follows: Sam Ferris, fourteen years; Frank Ferris, eleven years; Myrick Ferris, eight years; Caldna Ferris, four years; Henry Ferris, two years; Dovie Emeline

Ferris and Lovie Eveline Ferris, two months. (Rec. 76.)

The plaintiff in error (defendant in the court below) propounded interrogatories to Sam and Frank Ferris, plaintiffs in the court below, and placed the same in the hands of an officer, and the officer returned them certifying that the witnesses refused to answer; and when plaintiffs placed Sam Ferris on the witness stand for the purpose of giving his evidence in the case, defendant moved the court that said interrogatories be taken as confessed against said parties, because of their refusal to answer them, and that the said Sam Ferris should not be permitted to testify as a witness touching the matter inquired about in said interrogatories, on the ground that the amendment of April 22, 1897, of the statute regulating the taking of depositions of parties *ex parte*, and which provided that where either party was a corporation neither should have the right to take depositions *ex parte*, was in violation of the fourteenth amendment to the Constitution of the United States, and denied to defendant the equal protection of the law. The court overruled the motion. Thereupon the plaintiffs asked permission to introduce testimony for the purpose of ascertaining whether the refusal of the parties, Sam and Frank Ferris to answer the interrogatories was willful, and thereupon, without objection on the part of defendant, it was proved that the said parties were aged fourteen and twelve years, respectively; that the officer went out in the country to the place where the boys were staying, and there met their uncle, the boys being present; that the officer made known to him his desire to take the depositions of the boys, and the uncle stated that he could not permit him to ask them any questions or them to answer any; that he did not read a single interrogatory to either of the boys and call upon him to answer it, and that neither of them refused to answer—the uncle refusing for them; that the uncle stated "he would bring the boys to town that afternoon to see their attorneys, and then if there was no objection, Judge Garwood could ask him (them) what he wanted to." The

court overruled the motion of defendant to take the interrogatories as confessed, and overruled the motion that the said Sam Ferris should not be permitted to contradict or testify upon the matters embraced in said interrogatories. (See bill of exceptions copied in motion to dismiss writ of error; also Rec. 38, 39, 40, 41.)

Article 2293 of the deposition statute, which is the same as section 3 of the act of February 15, 1858, is as follows: "Either party to a suit may examine the opposing party as a witness, upon interrogatories filed in the cause, and shall have the same process to obtain his testimony as in the case of any other witness, and his examination shall be conducted and his testimony received in the same manner and according to the same rules which apply in the case of any other witness, subject to the provisions of the succeeding articles of this chapter."

Article 2297, which is the same as section 5 of the said act, and under which the interrogatories were asked to be taken as confessed, is as follows: "If the party interrogated refuses to answer, the officer executing the commission shall certify such refusal, and any interrogatory which the party refuses to answer, or which he answers evasively, shall be taken as confessed."

Article 2293a, which is the amendment of April 22, 1897., is as follows: "Where either party to any suit is a corporation, neither party thereto shall be permitted to take *ex parte* depositions."

The plaintiff in error makes but one assignment of error, which is as follows: "First: The court of civil appeals for the third supreme judicial district of the State of Texas erred in overruling and in refusing to sustain as well taken the eighth assignment of error filed in the court below, complaining of the action of the court below in refusing to take as confessed the *ex parte* interrogatories propounded to plaintiffs Sam Ferris and Frank (Price Franklin) Ferris, under the provisions of chapter 3, title 40, of the Revised Statutes of the State of Texas, relating to *ex parte* interroga-

tories of parties, and in refusing to sustain the motion of defendant, that said Sam Ferris should not be permitted to testify as a witness concerning the matter covered by said interrogatories, the said Frank and Sam Ferris having failed and refused to make answer to the interrogatories propounded to them by plaintiff in error, defendant in the court below, which assignment is as follows:

Eighth Assignment of Error.

"The court erred in refusing to take as confessed the interrogatories propounded to Sam Ferris and Frank Ferris under the provisions of chapter 3, title 40, of the Revised Statutes, relating to *ex parte* interrogatories, and in refusing to sustain the motion of the defendant that the said Sam Ferris should not be permitted to testify concerning the matter covered by said interrogatories, for the reason that the statute of 1897, forbidding the taking of *ex parte* depositions where a corporation is a party, is contrary to and in conflict with the 14th amendment to the Constitution of the United States, in this: That it deprives the defendant corporation of the equal protection of the laws, as will more fully appear from defendant's bill of exception number two."

Defendants in error, in opposition to the said ground of error and in support of their motion to dismiss the writ of error, make the following propositions:

I.

The bill of exceptions shows that Sam and Frank Ferris, the minor plaintiffs, did not refuse to answer the interrogatories. The officer in whose hands the interrogatories were placed testified that he did not call upon either of the boys to answer, and that neither refused to answer—he claiming their uncle refused for them. The rights of the boys could not be prejudiced by any thing their uncle did. Even their

next friend was powerless to do anything to the prejudice of their rights.

Kingsbury vs. Buckner, 134 U. S., 680.
14 Ency. of Pl. and Pr., 1035.

II.

However, if it should be held that the refusal of the uncle to permit the minors to answer the interrogatories was equivalent to their refusing to answer them, defendants in error say that the rule in Texas is that, in order for *ex parte* interrogatories to be taken as confessed for refusal to answer, the refusal must be deliberate and willful; and in this case the refusal was for time to consult the parties' attorneys, the promise being distinctly made that they would answer if their attorneys had no objection. It has many times been held by the courts of last resort in Texas that a refusal to answer until the party could consult with his counsel was not contumacious, and afforded no ground for taking the interrogatories as confessed.

Bounds vs. Little, 75 Texas, 318, 319.
Robertson vs. Melasky, 84 Texas, 561.
Wofford vs. Farmer, 90 Texas, 655.
McLaughlin vs. Carter, 13 Civ. App., 699, 700.

The latest utterance by the Texas Supreme Court on the point is in Wofford vs. Farmer, *supra*, where this language is used:

"The statute gives a party to whom interrogatories are propounded by his adversary the right 'in answer to the questions propounded, to state any matter connected with the cause and pertinent to the issue to be tried.' (Revised Statutes, Art. 2296.) Consultation with his counsel is necessary to a judicious exercise of this right. The privilege given by the statute to a party to a suit to propound interrogatories to the opposite party for the purpose of discover-

ing evidence is an important one; but in our opinion was not given for the purpose of entrapping his adversary, and hence the latter should not be denied the right of consultation with his attorney. A refusal to answer without giving a reasonable time for such consultation should not be deemed contumacious, and a certificate made under such circumstances should, upon a proper motion supported by proof of the facts, be suppressed."

In some of the cases, as in Wofford vs. Farmer, a motion would be made *in limine* to suppress the interrogatories, and the court would hear evidence as to the willfullness of the party in refusing to answer and rule upon the question in advance of the hearing on the merits. In Bonds vs. Little, *supra*, the inquiry as to whether the refusal was willful was entered into without objection during the progress of the trial, and it was held that the court after hearing the evidence could refuse to permit the interrogatories to be read to the jury as confessed—and this was the course taken on the trial of this case. The following is the language of the supreme court: "In this case, however, the record does not show that any objection was made to entering upon the inquiry as to the truth of the certificate during the progress of the trial. We think, therefore, that the court after hearing the evidence should have refused to permit the interrogatories to be read to the jury, and should then have allowed the defendant the opportunity of answering them."

The conduct of the minor parties was what might have been expected of boys of their ages. They were staying at their uncle's house and were under his care, and it could not be expected that they would overrule him and answer against his will. The facts attending the effort of the officer to take the depositions, which are undisputed, make it clear that the minors exercised no volition of their own, and the law could not, therefore, impute to them any willfulness, which according to the establised rule in Texas it must have done before the interrogatories could be taken as confessed.

III.

Another reason why the interrogatories should not have been taken as confessed against the minor parties is that their answers were attempted to be taken without the consent or knowledge of their next friend. It is true that the bill does not affirmatively so state, but its language leaves no room to doubt that such was the case.

From the earliest time in Texas to the passage of the act of August 15, 1870, a minor without a guardian had to sue by next friend.

Cannon vs. Hemphill, 7 Texas, 201.
Robson vs. Osborn, 13 Texas, 305.

In the first case cited it is said: "It seems that a *prochein ami* for an infant was not known before the statutes of Westminster, passed in the reign of Edward the First; and though this statute was not introduced by the adoption of the common law, yet upon the introduction of that system, the rule, under the statute, seems immediately to have been carried out in practice; and this has continued for such period of time, and been sanctioned by such general usage, that it would seriously endanger the multiplied rights growing up and settled under such rule were it now declared to be unauthorized by law." (p. 201.)

This decision was made in 1851.

The only change which the act made was to require that in suits by a minor who had no regular guardian the court should appoint a special guardian "to take care of the interests" of the minor, and that he should take an oath and give bond for the faithful performance of his duty.

The same act defined who were minors, as follows: "Male persons under twenty-one years of age, and females under twenty-one years of age and unmarried are minors." (Sec. 305.)

The act also contained this provision. "The law supposes that minors, persons of unsound mind, and habitual drunk-

ards have not capacity to take care of their persons or estates. It therefore provides that there shall be certain persons whose duty it shall be to take care of them." (Sec. 307.)

By the adoption of the Revised Statutes of 1879 the act was repealed in so far as requiring the appointment of special guardians was concerned, and the right of a minor to sue by next friend was thereafter recognized.

Evansich vs. G., C. & S. F. Ry. Co., 57 Texas, 126.
Abrahams vs. Vollbaum, 54 Texas, 227.

On February 11, 1893, the Legislature of Texas passed an act providing that "any minor having a sufficient cause of action, and who has no legal guardian, can bring suit in any of the courts of this state by next friend, and such next friend shall have the same rights concerning such suit and the matter therein involved as if he were guardian of such minor." (Art. 3498*u*, Revised Statutes of 1895.)

This act was in force when the suit was brought.

Respecting the rights of a guardian concerning a suit for his ward, Art. 2623 of the Revised Statutes of 1895, which was passed as section 76 of the act of 1876, provides that the guardian of the estate of a minor shall have the right "to bring and defend suits by or against him."

Art. 1197, which was passed as section 44 of the act of May 13, 1846, provides that, "suits for the recovery of * * * damages * * * may be instituted by executors, administrators or guardians appointed in this state, in like manner as they could have been by their testator or intestate, and judgment in such cases shall be as conclusive as if rendered in favor of or against such testator or intestate," etc.

These articles, which are still in force, clearly give a minor the right to sue by next friend and vest in the next friend power to control the action and represent the interests of the minor.

To permit an adult party opposed to a minor party to

deal directly with the minor, as was attempted in this case, would prevent the next friend from performing the duty enjoined upon him by the statute law of the state and deprive the minor of the advice and protection which the law intends thereby to secure to him.

The very provision of the deposition act, too, made it the duty of the plaintiff in error to make known to the next friend its purpose to propound interrogatories, because if the minors were legally bound to answer them they had the right "to state any matter connected with the cause and pertinent to the issue to be tried." The judicious exercise of this right required the use of discretion, which is the thing the law made it the duty of the next friend to supply. The very aim of the law in appointing a next friend is that he shall exercise discretion for the minor party.

14 Ency. of Pl. and Pr., 1003.

While it is believed that it is hereinafter shown that minor parties are not within the terms of the deposition statute, if it should be held that they are, then the next friend ought to have been given an opportunity to advise them as to whether they should answer or refuse to answer; and had the next friend been given this opportunity it might be she would have advised that they answer, in which event plaintiff in error would have had no ground of complaint. It is true, it appears that the uncle stated that he was told by Cass Ferris that the attorneys advised that the parties should not answer. The statement was purely hearsay and ought not to be binding upon the minor parties. But, taking it as true, it fairly appears from the bill that it was a general caution and had no reference to the particular interrogatories. But, even if it could be construed as relating to the particular interrogatories, it was advice that was entirely consistent with the right of the parties to have time to consult their counsel, and the inference is not unwar-

ranted that if any such advice was given it was with that view. The uncle proposed to take the boys to town to see their attorneys and then that they would answer if there was no objection. If the attorneys had given peremptory instruction not to answer at all, and the uncle was acting under such instruction, it is hardly probable he would have made the proposition. But be this as it may, if the minor parties were competent to bind themselves by refusal to answer, they were competent to couple with the refusal a request for time to consult their counsel; and this, on the authority of Wofford vs. Farmer, *supra*, would save them from contumacy and deprive their adversary of the right to have the interrogatories taken as confessed.

If plaintiff in error had obtained a release from the minor parties of their right of action against it, under the same circumstances the court would not have held them bound thereby. The reason would have been that being minors they could not legally bind themselves by any such act. In Texas, minors can only bind themselves by contract for necessaries. Why, therefore, should not the same rule apply to a refusal to answer *ex parte* interrogatories?

If a minor has not capacity to bind himself by contract, on what principle ought he be held bound for refusing to answer such interrogatories? Certainly only upon some procedure taken in strict compliance with law. Can it be said that such procedure was taken by plaintiff in error in view of the fact that it ignored the next friend, who was charged with the duty of caring for the interest of the minors? It would seem not.

Here the plaintiff in error is seeking to defeat altogether the right of action of the minor parties because of their alleged refusal to answer the *ex parte* interrogatories; and it ought not to be allowed to succeed except upon a clear showing that it proceeded in strict accordance with law, and that the minors had the full protection which the law guaranteed to them.

IV.

When the minors were made parties to the suit they became "wards of the court," and the court would exercise its jurisdiction for their protection and benefit.

Brooke vs. Clark, 57 Texas, 111.
Moore vs. Moore, 4 Sandf, 44,
Bank of U. S. vs. Ritchie, 8 Peters, 143.
Bispham's Principles of Equity (3d Ed.), Sec. 541 *et seq.*
3 Pom. Eq. Jur., Sec. 1035.

The courts of Texas possess and exercise full chancery jurisdiction.

Revised Statutes of 1895, Art. 1107.
Grassmeyer vs. Beeson, 18 Texas, 766.
Simpson vs. Huston, 14 Texas, 481.
Brooke vs. Clark, 57 Texas, 111.

The district court, in the exercise of its inherent chancery jurisdiction, had power to refuse to allow the interrogatories to be taken as confessed. And if any predicate had to exist for its exercise other than the mere fact that the minors were wards of the court, the ignoring of the next friend in the effort to propound the *ex parte* interrogatories would be all sufficient.

V.

Minor parties to a suit are not within the terms of the statute relating to the taking of *ex parte* depositions of parties.

The article (2297) requires as a condition precedent to taking the interrogatories as confessed, that the party interrogated shall refuse to answer or answer evasively. This must mean that the party has the discretion which the law requires a person to have in order to conduct a suit. An interpretation which would exclude the idea of the party's having such discretion would make the statute embrace idiots, lunatics and persons *non compos mentis*, for they may be

parties to a suit. Certainly it will not be contended the legislature meant to include such parties. But if they are to be excepted, then infants for the same reason must be excepted, because they are "not considered as having sufficient discretion to conduct a suit in person."

Act of 1870, Sec. 307, quoted above.
Articles 3498u and 1210, Revised Statutes of Texas, 1895.
G., C. & S. F. Ry vs. Styron, 66 Texas, 425.
14 Ency. of Pl. and Pr., 1003, and note 1.

Article 2296, already referred to, in the provision giving the party interrogated the right, in answer to questions propounded, to state any matter connected with the cause and pertinent to the issue to be tried, bears out the construction contended for.

An infant party is not supposed to know what are the matters connected with the cause and pertinent to the issue to be tried. Only persons *sui juris* are presumed in law to know this.

The Revised Statutes of Texas, 1895, are very full in their provisions for the protection of infants in their property rights.

An infant possessed of an estate must have a guardian (Art. 2594), who "is entitled to the possession and management of all property belonging to the ward; to collect all debts, rents, or claims due such ward; to enforce all obligations in his favor; to bring and defend suits by or against him." (Art. 2623.)

If the minor has a cause of action, and no guardian of his estate, he may sue by next friend, who has the same rights as a guardian. (Art. 3498u.)

If the minor is sued, and has no guardian within the state it is the duty of the court to appoint a guardian *ad litem* for him. (Art. 1210.)

Can it be that the legislature, after taking such care to safeguard the rights of a minor, intended, in case he should

be made a party to a suit in which they were involved, to expose him to the hazard of losing them through the statute in question?

Again, to embrace minors within the terms of the deposition statute would limit the courts in the exercise of their chancery powers for the protection of infants, and it is not reasonable to suppose the legislature intended by the adoption of the statute to restrict the jurisdiction of the courts.

Re Frits et al., 2 Paige Ch. 375, 379.

In the case of the Lessee of Brewer vs. Blougher, 14 Peters, 198, referring to the duty of courts to restrict the meaning of a statute, it is said:

"It is undoubtedly the duty of the court to ascertain the meaning of the legislature, from the words used in the statute, and the subject matter to which it relates; and to restrain its operation within narrower limits than its words import, if the court are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it."

The Supreme Court of Texas, in a case involving the rights of a minor and the application of general statutes to minors, have recently made a decision which strongly supports the construction contended for by defendants in error.

Walker vs. Rogan, Commissioner, 93 Texas, 251-254.

The question in the case was, whether a minor could purchase school land under certain acts of the legislature which were general in character. The court, holding that a minor was not within the purview of the acts, used this language: "Statutes general in their language have often been held inapplicable to minors because the things required or permitted were such as, by general principles, minors were incapacitated from doing" (p. 254)—citing Farris vs. Richardson, 6 Allen, 121.

The deposition statute belongs to the class of general statutes mentioned in the opinion.

The cases of Moore vs. Moore, 4 Sandf. Chancery, 43, 44, 45, and Mayor vs. Collins, 24 Q. B. Div., 361, are directly in point.

In Moore vs. Moore, after stating that the "general rule is * * * * that one defendant may examine as a witness, in his own behalf, another defendant who is not interested in the question to which he is called," it is said:

"Is an infant within the general rule? An infant's admissions may be proved against him, but they are to be cautiously weighed with reference to his age and understanding.

"Here the infant could not be compelled to testify. The officer appointed by the court to watch over his interests in the suit objected to his being examined. If these defendants had sought to compel him to testify by a cross-bill, the court would not have permitted him to answer on oath; and if he had inadvertently admitted their allegations, they would not be entitled to any relief upon such admission.

"The court was bound to see that an infant litigant's rights and interests are protected. It will not suffer him to make a discovery in the suit, nor to affect his rights by any admission contained in his answer. When there is a discretion to be exercised for him or affecting his interests, the court appoints a suitable person or refers it to a master, to execute such discretion. In short, it protects him against his own immature judgment and improvident conduct, as well as against the acts and designs of others.

"For these positions, I refer to a few of the numerous authorities, viz.: Napier vs. Effingham, 2 P. Wms., 403; Wrottesley vs. Bendish, 3 P. Wms., 237; Legand vs. Sheffield, 2 Atk., 377; Bulkley vs. Van Wyck, 5 Paige, 536; Stephenson vs. Stephenson, 6 Paige, 353; Bing. Inf., 114–121. In Serle vs. St. Eloy, 2 P. Wms., 386, the Master of the Rolls refused to act on an admission made against her interest in a bill filed by an infant, and directed the cause to stand over so that the bill might be amended. And see

Lady Effingham vs. Napier, 3 Bro. P. C., 301. Lord Thurlow, it is true, allowed the infant's guardian *ad litem* to be examined as a witness; but the report does not show whether it was in favor of the infant or against him. (Walker vs. Thomas, 2 Dick, 781.) In any event he, as guardian merely, had no interest in the event of the suit. The argument is plausible, that an infant ought to be permitted to tell the truth, even when it is against his own interest. And the argument would be equally cogent, to allow a complainant to compel an infant who is eighteen or twenty years of age to answer his bill on oath and be bound by his discovery. But so long as the court undertakes to protect the rights of infants,—shielding them from discovery, exercising all discretion for them, and precluding them from influencing their interests, either by their acts or their admissions in pleading,—I think it would be subversive of the principles upon which the court thus proceeds, to suffer an adult defendant, by any inducements, whether of persuasion or of threats to obtain an infant's consent to appear and testify as a witness against his own interest, in a cause where he is a party.

"I do not say that in every such case the adult defendant shall be inflexibly precluded from obtaining testimony from an infant co-defendant; but I am entirely satisfied that it should not be permitted except by the special order of the court, made upon a full understanding of all the circumstances."

In Mayor vs. Collins, which was an "Appeal against the order of a master in an action for libel, giving the defendant leave to deliver interrogatories for the examination of the plaintiff, an infant suing by his next friend," it is said by A. L. Smith, J.: "I am of the same opinion. The learned counsel for the plaintiff has convinced me that, for whatever reason, it was not the practice of the Court of Chancery to allow interrogatories to be administered to infant plaintiffs or defendants. I was struck by the observations which were made upon the anomalous results of the rule, but there

is nothing to show that it has been altered by the judicature acts. It is true that the language of the Order XXXI N. 1, 'the plaintiff or defendant may * * * * deliver interrogatories for the examination of the opposite parties' is perfectly general, but it must obviously be read in connection with that of other rules which relate to parties under disability."

Respecting what is said in the quotation from Moore vs. Moore, *supra*, to the effect that a court will not suffer an infant to make a discovery, it has been held by the Texas Supreme Court that the proceeding authorized by the deposition statute is in the nature of a bill of discovery, and was "intended to answer the same purpose."

Love vs. Keowne, 58 Texas, 197.
Cargill vs. Kountze, 86 Texas, 395.

To construe the statute so as to defeat the right of action of the minor parties as is attempted to be done in this case, would be a reproach upon the law and as well upon the justice of the state.

In Bispham's Principles of Equity it is said: "It is essential to every well ordered social system that there should exist some judicial authority by which protection may be afforded to those who cannot protect themselves; in other words, that there should be some tribunal whose duty it is to supervise the care of the persons and estates of infants, idiots and lunatics." (Sec. 541.) Certainly it cannot be maintained that Texas' courts are without such authority.

Believing that it has been shown that the judgment of the court below can be sustained upon grounds which are not Federal in character, defendants in error submit that the writ of error ought to be dismissed.

On the point that this court will dismiss a writ of error to a judgment of a State court, although the judgment decided a federal question adversely to the plaintiff in error, where

another question, not federal, was raised and decided against him and which was sufficient to sustain the judgment:

Harrison vs. Morton, 171 U. S., 46, 47.
Chappell Chem. & Fert. Co. vs. Sulphur Mines Co., 172 U. S., 471.
Pierce vs. Somerset Ry., 171 U. S., 648, 649, 650.
Egan vs. Hart, 165 U. S., 191.
Eustis vs. Bowles, 150 U. S., 366, 370.

In the first case cited, this language is used: "It is manifest that the pleadings of the parties presented for decision other questions besides Federal ones, and which could be, independent of the Federal ones, determinative of the controversy. Assuming, therefore, that a Federal question was involved, it does not appear but that the decision was given on the contention of the defendant that the agreement never became operative for want of delivery. This contention was clearly presented by defendant's prayers, and they contained the only rulings urged upon the court in that way, that is, in the nature of instructions.

"They were given and the verdict was generally for the defendant. It is, therefore, natural to presume that the verdict was rendered on account of them and on the ground urged by them. The ruling of the court granting them was sustained by the supreme court of the state. It affirmed the ruling as correct in law and as supported by competent testimony. The supreme court, it is true, passed on other grounds, passed on the one which it is claimed involved a Federal question, and decided it adversely to plaintiff. But the rule in such cases has been repeatedly declared by this court. It is not necessary to review the decisions. That has been done by Mr. Justice Shiras in Eustis vs. Bolles, 150 U. S., 361. It is sufficient to announce the rule pronounced in the case:

"'It is settled law that, to give this court jurisdiction of a writ of error to a state court it must appear affirmatively,

not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. (Murdock vs. Memphis, 87 U. S.; 20 Wall., 590; Cook County vs. Calumet & Chicago Canal & D. Co., 138 U. S., 635.) It is likewise settled law that, where the record disclosed that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised, and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment.'"

It follows from what precedes that the court below could have sustained the plaintiff in error's contention that the amendment of April 22, 1897, was unconstitutional, and still have denied the motion to take the interrogatories as confessed, on the ground that the minor parties were *non sui juris*, and therefore not within the purview of the statute, that they did not refuse to answer, or, if they did, that their refusal was not willful and that this court is without jurisdiction.

As to the motion to affirm because the writ of error is manifestly sued out for delay, defendants in error submit that the contention that the amendment of April 22, 1897, is violative of the Fourteenth Amendment of the Constitution of the United States and denies to plaintiff in error the equal protection of the law, and that it is entitled to have the interrogatories propounded to the minor parties taken as confessed for their refusing to answer, is frivolous.

That a corporation generally acts through agents and servants, who have no power to speak for it, and its corporate officers, as a rule, have no personal knowledge of the acts or omissions of the agents and servants, which furnish

the foundation of suits against it, is a sufficient basis for the enactment of the statute.

A., T. & S. F. Ry. Co. vs. Matthews, 174 U. S., 97, *et seq.*
Magoun vs. Illinois Trust and Savings Bank, 170 U. S., 293, *et seq.*

The statute operates the same upon the citizen who is a party to a suit against a corporation, thus securing uniformity and equality, and for this reason is not unconstitutional.

Mo. Pac. Ry. Co. vs. Mackey, 127 U. S., 207, 208.

The Supreme Court of Texas has distinctly held the statute not to be obnoxious to the Fourteenth Amendment.

H. & T. C. Ry. Co. vs. Stewart, 92 Texas, 546.
For the opinion of the Court of Civil Appeals in the case, see 48 S. W. Rep., 804.

The truth is, the amendment was necessary to place the citizen litigating with a corporation upon an equal footing with it, and this is the aim of the Fourteenth Amendment.

H. & T. C. Ry. Co. vs. Stewart (Ct. Civ. Apps.), 48 S. W. Rep., 804.

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